

Employer Dos and DON'TS

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Alternative Title:

Hiring, Firing, and the In-Between Bits...

Now Hiring

How do I get the right person for the job?



Hiring Dos — Setting things up for success.

- **Job Posting**

Accurately describe the position, job duties, and minimum qualifications

- **Interviewing**

Should allow for applicant to demonstrate abilities – skill related questions

Watch for red flag behaviors

- **Check references**

Take the time to do this, it makes a difference!

Social media checks? It's a double-edged sword.

- **Hire the most qualified candidate, right?**

Ability to do the job

Good judgment and character

Competence and overall fit

- **Observe and document applicant behavior.** (It's not going to get any better than this!)

Document reasons for selection/rejection

Be objective – applicant qualifications and what they do or say



YOU'RE HIRED!

Hiring (omg, please) DON'TS – This could really hurt...

- **Ignore the red flags to get a position filled** – It's not going to get any better than this!
 - Not courteous to your office staff*
 - Late for interview*
 - Inappropriate dress/hygiene*
 - Reveals confidential information about former employer*
 - Criticizes former employer or angry about prior employment*
 - Bad references*
- **90% of your time is spent on 10% of your employees** – problem employees take up time, money and energy, so get the right ones.
- **Make hiring decisions based on illegal reasons.**
 - Race, religion, ethnicity, sex & gender (gender stereotyping), pregnancy, age (40+), disability, genetic information, veteran status*
 - Careful with your questions...*



Do your job!

Managing performance
and conduct issues.

Performance & Conduct Management Dos

- **Talk Early**
Try to address and correct small issues before they get out of control
- **Listen to Employee Explanations**
Fix misunderstandings or miscommunications
Medical issues raised???
- **Keep Emotion Out of It**
Work with HR or Legal for an outside/neutral perspective
Keep it fact based
- **Document, Document, Document** – Follow up to conversations in writing (email)
What they did that was right/wrong (be honest in performance reviews – not everyone's a 5/5)
Efforts to help them improve (e.g., training, mentors, extended deadlines)
Set (achievable) expectations – be specific with goals and timing/deadlines
Notify employee of consequences for not improving – can result in termination
Continued or new issues – progressive discipline
Be able to show a non-discriminatory reason anytime an employment or pay decision is made.



What would you say... you do here?

Performance & Conduct Management DON'TS

- **DON'T Treat Similarly Situated Employees Differently**
Risk of discrimination – best defense is consistent application of rules and policy
- **DON'T Ignore Medical Issues when Raised**
Reasonable Accommodation Process – often first comes up as the result of negative performance review or counseling
- **DON'T Write up Personality**
Address behavior (actions and words), not personality.
- **DON'T Hold Protected Leave Against Employees**
FMLA, ADA, Military
- **DON'T Micromanage / Over-Scrutinize Complaining Employees**
Retaliation – Complaints have protection



You're Complaining???

What to do with this complaint.

Complaint Dos

- **Take it Seriously**
Even if you think it's bogus – because you never know...
- **Act Promptly (Immediate)**
Determine who will investigate.
HR? General Counsel? Outside Investigator?
Take interim measures if needed
Paid Investigation Leave?
Investigate – define the scope, collect documentation, identify and speak to witnesses, keep confidential
- **Back-up Conclusions with Facts**
Be objective not subjective (e.g., “She rolled her eyes” versus “She was unprofessional”)
- **Take Appropriate/Effective Corrective Action**
Be consistent, but can tailor to specific situation and severity
- **Follow your Policy**
Zero tolerance policy?
- **DOCUMENT IT!**



**And if you have a problem with that,
then you can talk to our complaint department**

Complaint DON'TS

- **DON'T Brush It Off**

Prompt / Immediate action is key

- **DON'T Ignore an Apparent Conflict of Interest**

Does the investigator have independence to make findings?

Is there an appearance issue?

- **DON'T Play Favorites**

Consistency is key to avoid later complaints of discrimination...

- **DON'T Discipline or Fire (without consulting HR/Counsel)**

Retaliation – Good faith / reasonable complaints have protection, even if unsubstantiated

- **DON'T Increase Scrutiny**

Yup, that's retaliation too.

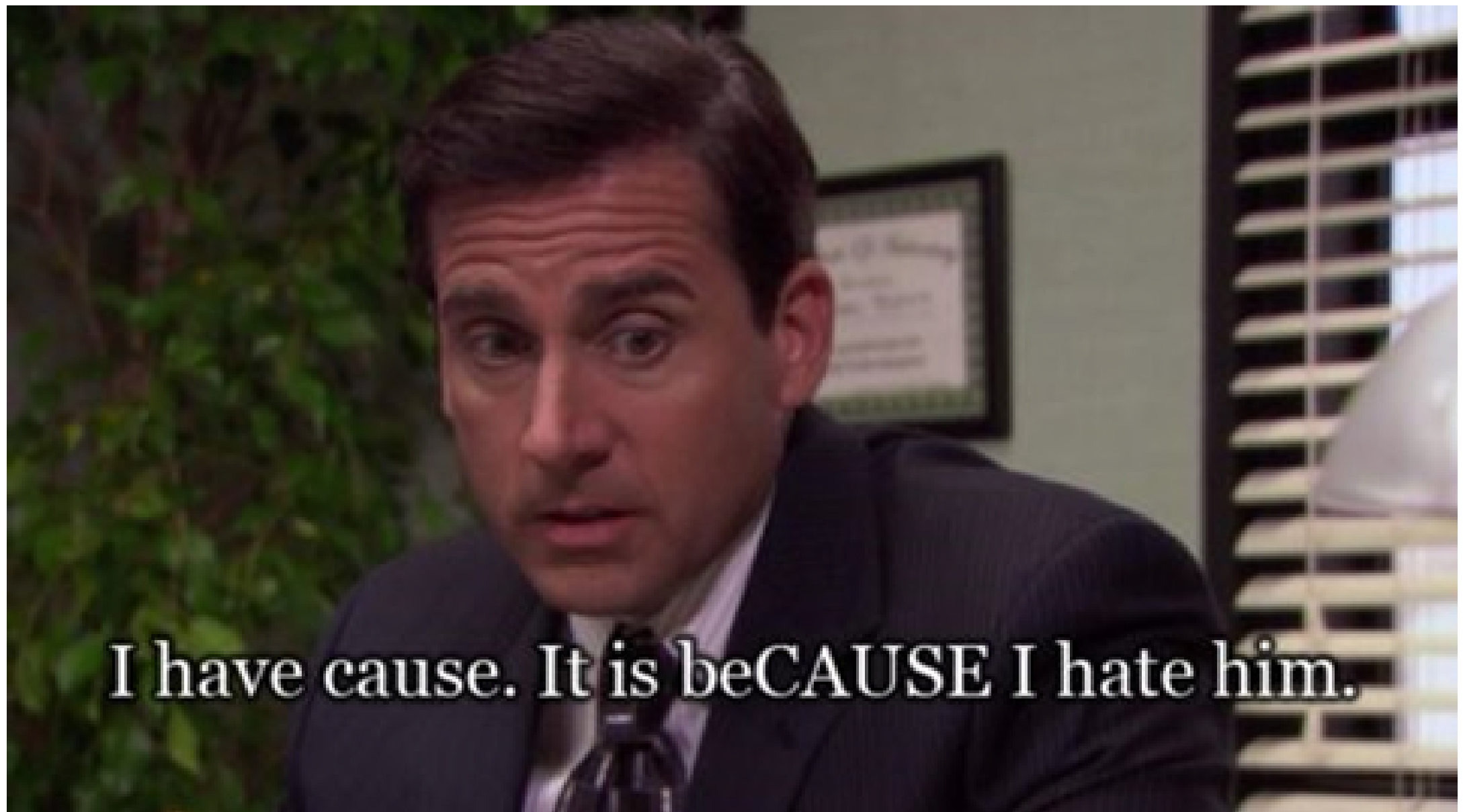


It's Over.

How to end the employee relationship without getting sued...

Firing Dos — At will or for cause?

- **Don't Rush it – get all the facts**
If an employee may be disruptive, consider putting them on paid leave during investigation.
- **Talk to the Employee First**
*Know what their explanation is for the performance or conduct issue.
Medical issues – loop in HR and/or Legal counsel!*
- **Document the Reasons**
*Reason for termination should be documented, just like prior write ups.
This will be your “Exhibit 1” if a claim is later filed.*
- **Meet in Person**
Have a witness (HR or Manager)
- **Keep it Short (not evasive)**
*Give a reason for termination, but don't get dragged into an argument (remember – you should already know their explanation at this point and have taken it into account)
If you don't give a reason at all though, the employee will fill in the blanks (Discrimination/Retaliation)*
- **Allow Resignation in Lieu?**
*Performance versus conduct issues
Can smooth things over – lets employee honestly tell future prospective employers they resigned instead of were fired.
Effect on unemployment benefits? Not a voluntary quit, so you will still have to prove misconduct.*



I have cause. It is beCAUSE I hate him.

Firing DON'TS — Keep away from discrimination and retaliation claims.

- **No Surprise Firings!**

Employees should never be surprised they are getting fired. Don't wait to address issues until you have hit your limit!

This is when progressive disciplinary policies are helpful.

- **DON'T Lie**

Don't give a false reason for termination, even if you are trying to be nice.

- **DON'T Discriminate**

Remember – Race, religion, ethnicity, sex & gender (gender stereotyping), pregnancy, age (40+), disability, genetic information, veteran status

Treat similarly situated employees the same, regardless of protected class.

Don't be lenient with one employee and strict with another (e.g., leave/tardiness issues)

- **DON'T Retaliate (EEOC's fastest growing claim category)**

FMLA, ADA, PDA, Protected Activity

Don't fire a complaining employee for something others have done without consequence

Hot Case Updates — Changing legal landscape.

- **Religious Accommodations**

Groff v. Dejoy – Supreme Court case that redefined the undue hardship standard.

Hebrew v. TDCJ – First 5th Circuit case interpreting *Groff v. Dejoy*.

- **Title VII Discrimination – Ultimate Employment Decision?**

Hamilton v. Dallas County – 5th Circuit overruled prior precedent on what makes an actionable discrimination claim, expanding it under “terms, conditions, or privileges of employment.”

Harrison v. Brookhaven Sch. Dist. – Under new *Hamilton* standard, found failure to pay for training actionable.

- **Harassment Complaint Investigations & Policy**

Hudson v. Lincare, Inc. – Importance of prompt and effective remedial action.

Wallace v. Performance Contractors – Policy in theory versus policy in practice. Material fact issue over implementation of anti-harassment policy.

- **Reasonable Accommodations (ADA)**

EEOC v. Methodist Hospitals of Dallas – Most qualified candidate versus assignment to a new position as an accommodation. Importance of participating in the interactive process.

Mueck v. La Grange Acquisitions – Employee’s claim fails for never making it clear that schedule change request for DUI classes was related to a disability. Never assume a disability!



Don't wait to call your lawyer until it's too late!



We just fired a minority, pregnant, over 40, disabled employee who recently returned from a workers' comp injury.

We fired her for complaining that her back still hurt.

It was so annoying.

Was that ok?



THANK YOU!

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